

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION (CIVIL) NO 1011 OF 2019
(PIL UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)
IN THE MATTER OF:

Ashwini Kumar Upadhyay
S/o Sh. Suresh Chandra Upadhyay
[Office: 15, M.C. Setalvad Chambers Block
Supreme Court of India, New Delhi-110001]
Residence: G-284, Govindpuram, Ghaziabad ...Petitioner

Verses

1 Union of India
Through the Secretary
Ministry of Law & Justice,
Shastri Bhawan, New Delhi-110001
2 Election Commission of India
Through the Chief Election Commissioner,
Niravachan Sadan, New Delhi-110001 ...Respondents

**PIL UNDER ARTICLE 32 TO RESTRICT POLITICAL PARTIES TO
SETUP CANDIDATES WITH SERIOUS CRIMINAL ANTECEDENTS**

To,
THE HON'BLE CHIEF JUSTICE OF INDIA
AND LORDSHIP'S COMPANION JUSTICES
OF THE HON'BLE SUPREME COURT OF INDIA
HUMBLE PETITION OF ABOVE-NAMED PETITIONER
THE MOST RESPECTFULLY SHOWETH AS THE UNDER:

1. Petitioner is filing this writ petition as a PIL under Article 32 seeking writ, order or direction to the Election Commission of India to restrict political parties to setup candidates with criminal antecedents in serious offences.
2. Petitioner has not filed any other petition in any Court except WP(C) 1319 / 2018 (Annex. P-1, Page 34) seeking same directions as prayed in this petition.
3. Petitioner's name Ashwini Kumar Upadhyay. Residence G-284, Govindpuram, Ghaziabad-201013, 08800278866, aku.adv@gmail.com, PAN: AAVPU7330G, AADHAAR-659982174779. Income 4 LPA.

Petitioner is an Advocate & social-political activist, contributing his best to development of downtrodden people.

4. Facts constituting cause of action accrued on 22.01.2019 and subsequent days, when petitioner submitted representation to ECI to restrict political parties to setup candidates with serious criminal antecedents, but it did nothing.

5. The injury caused is large because even the national political parties' setup candidates with criminal antecedents. Therefore, voters find it difficult to cast their vote freely and fairly, though it is a fundamental right under Article 19.

6. Petitioner has no personal interest, individual gain, private motive or oblique reasons in filing this petition. It is not guided for gain of any other individual person, institution or body.

7. There is no civil, criminal or revenue litigation, involving petitioner, which has/could have legal nexus, with the issues involved in this petition.

8. Petitioner submitted Representation to the ECI on 22.01.2019 (Annexure P-2, Page 35-37) to restrict the political parties to setup candidates with serious criminal cases but it has not taken appropriate steps till date.

9. This Hon'ble Court has issued directions to the ECI to exercise its plenary powers under Article 324 with respect to "*superintendence, direction and control*" of the conduct of elections and redress violations of the rights of voters guaranteed under Article 19(1) and protect purity of electoral process.

10. There is good reason why this Hon'ble Court may take steps to control the problem of criminalization of politics. A host of reports including the ECI's *Proposed Electoral Reforms* (2004), Law Commission's 170th and 244th Reports (1999 and 2014), the NCRWC's Proposals (2002), the Second Administrative Reforms Commission (2009) and the Vohra Committee (1993) have drawn attention to the severity of the problem and have suggested electoral reforms to stem the tide of criminals flowing into our polity.

11. Taking note of these reports, this Hon'ble Court has in a series of decisions over the last two decades taken steps to address the problem including by: (i) recommending the setting up a high level committee to consider Vohra Committee Report in *Dinesh Trivedi v. Union of India*, (1994) 4 SCC 306; (ii) directing the Election Commission of India to ensure that candidates file affidavits along with their nomination papers setting out the criminal cases pending against them in *Union of India v. Assn. for Democratic Reforms*, (2002) 5 SCC 294; (iii) holding that the disqualification under Section 8 of RPA would apply even where sentences run consecutively beyond two years in *K.Prabhakaran v. P.Jayarajan*, (2005) 1 SCC 754; (iv) striking down Section 8(4) of the RP Act which permitted sitting MP's and MLA's to continue in office if they have filed an appeal within a period of three months after conviction in *Lily Thomas v. Union of India*, (2013) 7 SCC 653; and (iv) recently, in WP(C)699/2016 directing the States to set up Special Courts to complete the trial of cases against sitting MP's and MLA's within one year.

12. Especially in the context of ethnic divisions such as caste and religious cleavages, criminals are able to get votes based on their caste or religious affiliation, their money power, their perceived willingness to “bend,” if not break, the law to favour their constituents and also because of coercion and intimidation including of their rivals. Criminals, in turn, have no interest in standing as independents and stand as candidates of political parties. Criminals want to stand as candidates of political parties because parties are still connected to distinct leaders, families, ethnic groups and social bases. Aspiring candidates can tap into these networks to expand their appeal beyond their own narrow support bases. Second, in a country with high rates of poverty and illiteracy, party symbols hold great weight; they serve as an important visual cue through which millions of voters connect to politics. As such, the historical legacy of parties matter a great deal in Indian democracy.

13. The consequences of permitting criminals to contest and become legislators are extremely serious for our democracy and secularism: (i) during electoral process itself, not only do they deploy “enormous amounts of illegal money” to interfere with the outcome but also intimidate voters and rival candidates. (ii) Thereafter, in our weak rule-of-law context, once they gain entry to the governance as legislators, they interfere with, and influence, the functioning of government machinery in favour of themselves and members of their organization by corrupting government officers and, where that does not work, by using their contacts with Ministers to make threats of transfer and initiation of disciplinary proceedings. Some even

become Ministers, which makes the situation worse. (iii) Legislators with criminal antecedents also attempt to subvert the administration of justice and attempt by hook or crook to prevent cases against themselves from being concluded and, where possible, to obtain acquittals. Long delays in disposal of cases against sitting MP's and MLA's and low conviction rates is testimony to their influence.

14. The empirical evidence supports the view that the current legislative framework permits criminals to become legislator. It (a) interferes with the purity and integrity of the electoral process; (b) violates the right to choose freely the candidate of the voter's choice and, therefore, the freedom of expression of the voter under Article 19(1)(a); (c) amounts to a subversion of democracy, which is part of the basic structure; and, finally, (d) is antithetical to the rule of law which is at core of Article 14 of the Constitution of India.

15. Criminalization of politics in India has only grown. National Election Watch and Association for Democratic Reforms (ADR) has analyzed the self-sworn affidavits of 539 out of 542 MPs of the present Lok Sabha. Elections in Vellore constituency had been cancelled and 3 MPs were not analyzed due to unavailability of their clear and complete affidavits on the ECI website at the time of making the report. Out of 539 MPs, 233 (43%) MPs have declared criminal cases against themselves. Out of 542 winners analyzed after 2014 General Election, 185 (34%) had declared criminal cases against themselves and out of 543 winners analyzed after 2009 Lok Sabha election, 162(30%) had declared criminal cases against themselves.

There is an increase of 44% in the number of MPs with declared criminal cases since 2009.

16. Presently 159(29%) MPs have declared serious criminal cases including cases related to rape, murder, attempt to murder, kidnapping, crimes against women etc. Out of 542 winners analyzed after 2014 Lok Sabha elections, 112 (21%) had declared serious criminal cases against themselves. Out of 543 winners analyzed after 2009 Lok Sabha election, 76 (14%) had declared serious criminal cases against themselves. So, there is an increase of 109 % in the number of winners with declared serious criminal cases since 2009.

17. Mr. Kuriakose from Idukki Constituency has declared 204 criminal cases including cases related to culpable homicide, house trespass, robbery, criminal intimidation etc. Total 30 MPs of the present Loksabha, have declared cases of attempt to murder (Section 307), 19 MPs have declared cases related to crimes against women and out of these 19 MPs, 3 MPs have declared cases related to rape (IPC Section-376). Total 29 MPs have declared cases related to Hate Speech.

18. ADR Report indicates that the chances of winning for a candidate with declared criminal cases in the Lok Sabha 2019 is 15.5 % whereas for a candidate with clean background, it is 4.7 %. Total 116 (39%) out of 301 winners from BJP, 29 (57%) out of 51 winners from INC, 10 (43%) out of 23 winners from DMK, 9 (41%) out of 22 winners fielded by AITC and 13 (81%) out of 16 winners from JD(U) have declared criminal cases against themselves in their affidavits. Total 87 (29%) out of 301 winners from BJP, 19 (37%) out of 51

winner from INC, 6 (26%) out of 23 winners from DMK, 4 (18%) out of 22 winners fielded by AITC and 8 (50%) out of 16 winners from JD(U) have declared serious criminal cases against themselves in their affidavits.

19. Out of the 539 MPs analyzed, 475 (88%) are crorepatis. Out of 542 winners analyzed during Lok Sabha 2014 election, 443 (82%) winners were crorepatis. Out of 543 winners analyzed during Lok Sabha 2009 election, 315 (58%) winners were crorepatis. Total 265 (88%) out of 301 MPs of BJP, 43 (84%) out of 51 MPs of INC, 22 (96%) out of 23 MPs of DMK, 20 (91%) out of 22 MPs of AITC, 19 (86%) out of 22 MPs of YSRCP and 18 (100%) MPs of SS have declared assets worth more than Rs. 1 crore. The chance of winning for a crorepati candidate in the Lok Sabha 2019 is 21%, whereas chance of winning for a candidate with assets less than Rs. 1 crore is 1%. A total of 4 out of the 539 winners analyzed have not declared their PAN details. The average assets of 225 re-elected MPs fielded by various parties including independents in 2014 was Rs 17.07 Crores. The average asset of these 225 re-elected MPs in 2019 is Rs 21.94 Crores. The average asset growth for these 225 re-elected MPs, between the Lok Sabha elections of 2014 and 2019 is Rs 4.87 Crores. Average percentage growth in assets for the 225 re-elected MPs is 29%.

20. Presently, 128 (24%) MPs have declared their educational qualification to be between 5th pass and 12th pass, while 392 (73%) MPs have declared having an educational qualification of graduate and above. One MP has declared himself to be just literate and One MP is illiterate. 194 (36%) MPs have declared their age to be between

25 and 50 years while 343 (64%) MPs have declared their age to be between 51 and 80 years. Two MPs have declared they are more than 80 years old. Presently, there are 77 (14%) women MPs. Out of 542 winners analyzed in the Lok Sabha elections 2014, 62 (11%) winners were women. Out of 543 winners analyzed in the Lok Sabha elections 2009, 59 (11%) winners were women.

21. What is alarming is that the percentage of candidates with criminal antecedents and their chances of winning have actually increased steadily over the years. In fact, empirical analysis shows that, where the charges against a candidate are serious, it slightly increases the statistical probability of his winning the election. Criminals who earlier used to help politicians win elections in the hope of getting favours appear to have cut out the “middle man” in favour of entering politics themselves. Political parties in turn have become steadily more reliant on criminals as candidates not only because they “self-finance” their own elections in an era where election contests have become phenomenally expensive but also because candidates with criminal antecedents are more likely to win than “clean” candidates. Political parties are competing with each other in a race to the bottom because they cannot afford to leave their competitors free to recruit criminals. Despite the above data, neither Government of India nor ECI have taken apposite steps to tackle the menace of criminalization. Hence this Hon’ble Court is the only hope now.

22. Petitioner is filing this petition, seeking a writ/order/direction to the Election Commission to insert an additional condition- “*political*

party shall not setup candidate with criminal antecedents” in Paragraph 6A “Conditions for recognition as a State Party”, Paragraph 6B “Conditions for recognition as a National Party” and Paragraph 6C “Conditions for continued recognition as a National or State Party” of the Election Symbols Order, 1968. The ECI should also introduce a definition in paragraph 2 of the Order as thus: “candidate with criminal antecedents means a person against whom charges have been framed at least one year before the date of scrutiny of nominations for an offence with a maximum punishment of five years or more”.

23. There would be no need even for enquiry by the Election Commission because candidates are required by Section 33A of the RPA,1951, read with Rule 4A of the Conduct of Election Rules, 1961 and Form 26, to file along with their nomination papers an affidavit containing detailed information relating to the framing of charges against them for offences punishable with imprisonment of 2 years or more. It includes the Sections under which they are charged, the Court that did so and the date on which charges were framed. It is necessary to state that the proposed directions does not constitute a disqualification in violation of the Articles 102 or 191 because the affected candidates can always stand for election as an Independent.

24. Any such direction by this Hon’ble Court to the ECI also would not breach the principle of separation of powers because there is a legislative vacuum insofar as the Parliament has not enacted any legislation in the field covered by the Election Symbols Order, 1968,

which has been issued by the ECI in exercise of its plenary powers under Article 324 of the Constitution.

25. Powers of the ECI under Article 324 operates in areas left unoccupied by legislation and is plenary in character. [*Kanhiya Lal Omar v. R.K. Trivedi, (1985) 4 SCC 628, Para 16*] The power of “superintendence, direction and control” of the conduct of elections, vested in the Election Commission, is executive in character. [*A.C. Jose v. Sivan Pillai, (1984) 2 SCC 656, p. 22*] The Symbols Order is traceable to the power of the Election Commission under Article 324. [*Kanhiya Lal Omar, para 16*] The power to amend, vary or rescind an order which is administrative in character under Section 21 of the General Clauses Act, specifically referred to in paragraph 2(2) of the Symbols Order, would permit the Election Commission to withdraw recognition of a political party. [*Janata Dal v. Election Commission, (1996) 1 SCC 235, para 6*]

26. Accordingly, it is clear that the proposed direction to the ECI to amend the Symbols Order would operate in a field where there is a vacuum. In fact, proposed direction is vital because the functions performed by legislators are vital to democracy and there is no reason why they should be held to lower standards than Judges or IAS officers. Candidates for judgeship or for the IAS would not be considered at all if there were criminal cases pending against them, let alone if charges had been framed in respect of serious offences.

27. Of course, the refusal to consider candidates for judgeship or the IAS may be on the touchstone of suitability and not eligibility but the proposed direction is not an eligibility condition for legislators but

merely imposes a condition on parties. Moreover, in the context of “institutional integrity” of office of the CVC, this Hon’ble Court has held that the pendency of criminal cases may be considered a bar on appointment to important offices such as the CVC. [*Centre for PIL v. Union of India, (2011) 4 SCC 1*]

28. The effect of proposed direction would only be to impose an additional condition on a political party for obtaining and retaining the status of a “*recognized national party*” or “*state party*”, which would entitle it to a reserved symbol under the Symbols Order. The statutory right to register a political party would not be affected in any way. Moreover, under Section 13A of the Income Tax Act, political parties are exempt from paying income tax on contributions received by them. Therefore, preventing them from fielding candidates with criminal antecedents in election is a reasonable restriction, keeping in mind the concessions and privileges enjoyed by them.

29. From the standpoint of the candidate against whom charges have been framed for a serious offence, the settled legal position is that he has only a statutory right to contest elections. [*Krishnamoorthy, paras 59-60*] Further, even assuming that he is innocent, it would have indirect impact of possibly preventing him *for limited period of time until his trial is over* from obtaining a ticket from a recognized political party but such a measure would be in the larger public interest of ensuring that our polity remains free of criminal.

30. The proposed direction cannot result in a violation of Article 19(1)(c) to form association. A candidate with criminal antecedents

can become/continue to be a member of the party. The condition that political party not give him a ticket as a condition for recognition as a State/National party to guarantee continued usage of reserved symbol does not impinge on freedom of association of candidate/party. Further, even assuming that it could be characterized as falling within the scope of Article 19(1)(c), proposed direction is a reasonable restriction that is narrowly tailored and can be justified on the ground of public order and morality in Article 19(4) of the Constitution.

31. The importance of insights from the social sciences in constitutional decision-making should not be minimized. Without innovations such as the Brandeis brief, that relied as much on data and analysis from the social sciences as legal arguments, many path-breaking decisions by the U.S. Supreme Court that led to a fundamental reorientation of constitutional law in the United States, would not have been possible. The landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) on affirmative action was based on similar data and analysis from the social sciences.

32. When nearly half (43%) of MP's in the Lok Sabha cutting across all political parties have criminal cases pending against them, it is not surprising that a Parliamentary Standing Committee in 2007 itself simply rejected the recommendation of the Law Commission in its 170th Report and the Election Commission's "*Proposal for Electoral Reforms*" to amend the RPA to impose an electoral disqualification on persons against whom charges have been framed for serious offences punishable by sentences of 5 years or more.

33. In this background, the decisions of this Hon'ble Court also support the compelling necessity for this Hon'ble Court to take immediate steps to deter candidates who have charges framed against them from contesting elections: **First:** In the context of upholding the denial of right to vote to those confined in jail, this Hon'ble Court in *Anukul Chandra Pradhan v. Union of India*, [(1997) 6 SCC 1], held "*...criminalization of politics is the bane of society and negation of democracy. It is subversive of free and fair elections, which is a basic feature of the Constitution. Thus, a provision made in the election law to promote the object of free and fair elections and facilitate maintenance of law and order, which are the essence of democracy, must, therefore, be so viewed*". (244th Report of Law Commission records the eminent jurist Fali Nariman "*articulated the need for enlarging the whole concept of disqualification and emphasized that the law needs to go ahead in order to promote purity and integrity of democratic process.*") **Second:** Criminals should not be allowed to become lawmakers. In *Association for Democratic Reforms*, this Court held: "*... voters may not elect law-breakers as law-makers and some flowers of democracy may blossom.*" [Also see *Prabhakaran*, para. 54)] **Third:** Candidates with criminal antecedents interfere with the purity of the electoral process through coercion and intimidation of voters and rival candidates, which is a violation of freedom of expression of voter under Article 19(1)(a). This Hon'ble Court in *Prabhakaran*, gave judicial recognition to the fact that "*...persons with criminal background do pollute the process of election as they do not have many a hold barred and have no*

reservation from indulging in criminality to win success at an election.” In PUCL [(2013) 10 SCC 1], Court recognized “...casting of vote is a facet of right of expression of an individual and the said right is provided under Article 19(1).” **Fourth:** Permitting criminals to become legislator results in the breakdown of rule of law both in terms of government machinery as well as in terms of administration of justice. The Court in Manoj Narula held: *“A democratic polity as understood in its quintessential purity, is conceptually abhorrent to corruption and especially corruption at high places and repulsive to the idea of criminalization of politics as it corrodes the legitimacy of the collective ethos, frustrates the hopes and aspirations of the citizens and has potentiality to obstruct, if not derail, the rule of law...”*. Therefore, the Hon’ble Court must take steps to ban criminals from contesting and uphold the rule of law inherent in Article 14.

34. In this background, this Hon’ble Court may direct the ECI to insert in Paragraph 6A *“Conditions for recognition as a State Party”* and Paragraph 6B *“Conditions for recognition as a National Party”* of the Election Symbols (Reservation and Allotment) Order, 1968, the additional condition as thus– *“No candidate with criminal antecedents shall be set up by the Political Party”*. In consonance with the Law Commission recommendations (244th Report), a definition should also be introduced in paragraph 2 of the Order as thus: *“candidate with criminal antecedents” means a person against whom charges have been framed at least one year before the date of scrutiny of nominations for an offence with a maximum punishment of five years or more.*

35. If the proposed direction is given, there would be no need even for an enquiry by the ECI because candidates are required by Section 33A of the RPA read with Rule 4A of the Conduct of Election Rules and Form 26 to file along with their nomination papers an affidavit containing detailed information relating to the framing of charges against them for offences punishable with imprisonment of more than 2 years. This would include the Sections under which they are charged, the court that did so and the date on which charges were framed. There are precedents for this Hon'ble Court to give directions to the ECI to preserve purity of elections and protect fundamental rights.

36. In *Association for Democratic Reforms*, this Hon'ble Court directed ECI to call for information on affidavit from each candidate, *inter alia*, listing the offences with which he is charged, assets of himself and his family by issuing necessary orders in exercise of power under Article 324. The Court held that: "**48.** *Finally, in our view this Court would have ample power to direct the Commission to fill the void, in the absence of suitable legislation covering the field and the voters are required to be well informed and educated about contesting candidates so that they can elect a proper candidate by their own assessment. It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to*

cover the field. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. Therefore, if the candidate is directed to declare his/her spouse's and dependants' assets –immovable, movable and valuable articles – it would have its own effect....”

37. In *S. Subramaniam Balaji v. State of T.N.*, (2013) 9 SCC 659, this Hon'ble Court directed the ECI to frame guidelines governing the contents of election manifesto to be included in the MCC. The Hon'ble Court held that: **“87.***Therefore, considering that there is no enactment that directly governs the contents of the election manifesto, we hereby direct the Election Commission to frame guidelines for the same in consultation with all the recognised political parties as when it had acted while framing guidelines for general conduct of the candidates, meetings, processions, polling day, party in power, etc. We are mindful of the fact that generally political parties release their election manifesto before the announcement of election date, in that scenario, strictly speaking, the Election Commission will not have the authority to regulate any act which is done before the announcement of the date. Nevertheless, an exception can be made in this regard as the purpose of the election manifesto is directly associated with the election process.”*

38. In *PUCL*, (2013) 10 SCC 1, this Hon'ble Court directed the ECI to give voters the option to choose “none of the above” in every election and held: **“53....***Thus in a vibrant democracy, the voter must be given an opportunity to choose none of the above (NOTA) button, which will indeed compel the political parties to nominate a sound candidate.*

This situation palpably tells us the dire need of negative voting. 63... In view of our conclusion, we direct the Election Commission to provide necessary provision in the ballot papers/EVMs and another button called "None of the Above" (NOTA) may be provided in EVMs so that the voters, who come to the polling booth and decide not to vote for any of the candidates in the fray, are able to exercise their right not to vote while maintaining their right of secrecy. Inasmuch as the Election Commission itself is in favour of the provision for NOTA in EVMs, we direct the Election Commission to implement the same either in a phased manner or at a time with the assistance of the Government of India..."

39. The proposed direction does not constitute a disqualification in violation of Articles 102(1)(e) or 191(1)(e) of the Constitution because the affected candidate can always stand for election as an independent. Any such direction by this Hon'ble Court also would not breach the principle of the separation of powers because there is a legislative vacuum insofar as Parliament has not enacted any legislation in the field covered by the Symbols Order, which has been issued by the Election Commission in exercise solely of its powers under Article 324. This follows because: (i) The power of the Election Commission under Article 324 of the Constitution operates in areas left unoccupied by legislation and is plenary in character. [*Kanhiya Lal Omar v. R.K. Trivedi, (1985) 4 SCC 628 (para. 16).*] The power of "superintendence, direction and control" of the conduct of elections vested in the Election Commission is executive in character. [*A.C. Jose v. Sivan Pillai, (1984) 2 SCC 656 (para. 22).*] (ii) The Symbols

Order is traceable to the power of the Election Commission under Article 324. [*Kanhiya Lal Omar (para. 16).*] (iii) The power to amend, vary or rescind an order which is administrative in character under Section 21 of the General Clauses Act, specifically referred to in paragraph 2(2) of the Symbols Order, would permit the Election Commission to withdraw recognition to a political party. [*Janata Dal v. Election Commission, (1996) 1 SCC 235 (para. 6).*] Accordingly, it is clear that the proposed direction to the ECI to amend the Symbols Order would operate in a field where there is a legislative vacuum. The proposed direction is vital because the functions performed by legislators are vital to democracy and there is no reason why they should be held to lower standards than Judges or Indian Administrative Service officers. Candidates for judgeship of the superior courts or for the Indian Administrative Service certainly would not be considered at all if there were criminal cases pending against them, let alone if charges had been framed in respect of serious offences.

40. Of course, the refusal to consider candidates for judgeship or the I.A.S. may be on the touchstone of suitability and not eligibility. It is worth noting, however, that the proposed direction is not an eligibility condition for legislators but rather merely imposes a condition on political parties. Moreover, in the context of “institutional integrity” of office of the Chief Vigilance Commissioner (CVC), this Hon’ble Court has held that the pendency of criminal cases may be considered a bar on appointment to important offices such as the CVC. [*Centre for PIL v. Union of India, (2011) 4 SCC 1.*]

41. There are very few constitutional offices as important as that of Legislators. In *P.V. Narasimha Rao case [(1998) 4 SCC 626 at para 162]*, a this Hon'ble Court while holding that MPs and MLAs are "public servant" for purposes of the Prevention of Corruption Act, 1988 held: "*In a democratic form of government, it is the Member of Parliament or a State legislature who represents the people of his constituency in the highest law-making bodies at the Centre and the State respectively. Not only is he the representative of the people in the process of making the laws that will regulate their society, he is their representative in deciding how the funds of the Centre and the States shall be spent and in exercising control over the executive. It is difficult to conceive of a duty more public than this or of a duty in which the State, the public and the community at large would have greater interest.*"

42. The effect of proposed direction would only be to impose an additional condition on a political party for obtaining and retaining the status of a "*recognized national party*" or "*state party*", which would entitle it to a reserved symbol under the Symbols Order. The statutory right to register a political party under Section 29A, RPA, would not be affected in any way. Moreover, under Section 13A of the Income Tax Act, 1961, political parties are exempt from paying income tax on contributions received by them. Therefore, imposing condition during elections preventing them from fielding candidates with criminal antecedents in an election is reasonable keeping in mind the concessions and privileges enjoyed by them.

43. From the standpoint of the candidate against whom charges have been framed for a serious offence, the settled legal position is that he has only a statutory right to contest elections and nothing more. (*Krishnamoorthy, paras 59-60*) Further, even assuming that he is innocent, it would have the indirect impact of possibly preventing him *for a limited period of time until his trial is over* from obtaining a ticket from a recognized political party that values its reserved symbol. Such a measure would be in the larger public interest of ensuring that our polity remains free of criminal elements. The test for determining whether such a direction would violate the fundamental rights should be whether this Hon'ble Court would uphold a law imposing a disqualification of similar nature considering presumption of constitutionality keeping in mind the larger public interest referred to above.

44. The proposed direction cannot result in a violation of the fundamental right guaranteed under Article 19(1)(c) of the Constitution to form an association. A candidate with criminal antecedents can become or continue to be a member of the political party. The condition that the political party not give him a ticket as a condition for recognition as a State or National party to guarantee continued usage of the reserved symbol does not impinge on the freedom of association of either the candidate or the political party. Further, even assuming that it could be characterized as falling within the scope of Article 19(1)(c), the proposed direction arguably is a reasonable restriction that is narrowly tailored and can be justified on

the ground of public order and morality in Article 19(4) of the Constitution.

45. Such a law would also pass the rational classification test under Article 14 because the class of candidates who have serious criminal charges framed against them is clearly distinct from the class that does not and the classification has a rational nexus with the larger objective of stopping the criminalization of the political system.

46. The objections may be that (a) it would violate the presumption of innocence and that the class of affected persons would include persons against whom false or frivolous cases have been filed; and (b) this Hon'ble Court cannot do indirectly what it may not do directly. The contention based on presumption of innocence is without merit. The presumption of innocence is defined as "*the fundamental principle that a person may not be convicted of a crime unless the government proves guilt beyond a reasonable doubt, without any burden placed on the accused to prove innocence.*" [BLACK'S LAW DICTIONARY, 10th Ed. (2014), p. 1378.] In fact, the proposed direction does not operate in the field of criminal law at all insofar as it only imposes an additional condition on a political party that it may not set up a candidate with criminal antecedents and failure to abide by the condition will only impact its ability to retain its reserved symbol. In *Prabhakaran* the Court held: "*...contesting an election is a statutory right and qualifications and disqualifications for holding the office can be statutorily prescribed. A provision for disqualification cannot*

be termed a penal provision and certainly cannot be equated with a penal provision contained in a criminal law...".

47. Proposed direction does not impinge upon presumption of innocence. **First**, the proposed direction does not have effect of convicting the candidate or subjecting him to imprisonment. **Second**, it does not impose a serious disability on the candidate to the extent that he can always stand as an independent. The alleged deprivation of having to make do without party financing is not empirically well founded. As noted above, persons with criminal antecedents are chosen by political parties in large part because they can pump large amounts of illegal funds into their elections. **Third**, the proposed direction would operate even against an innocent candidate only for a short period of time until his trial is over. This situation is analogous to a case where the conviction of a candidate is overturned on appeal. Even in the latter case, this Hon'ble Court in *Prabhakaran*, held that judgment reversing the conviction would not have the effect of wiping out disqualification on date of scrutiny of nominations while conviction was still subsisting. Moreover, even in the field of criminal law, presumption of innocence is not absolute. Many under trial person spent years, even decades sometimes, in jail, often beyond the sentence that they would suffer if convicted.

48. Further, by raising the threshold to the stage where charges have been framed before the restriction will operate, chances are considerably reduced of false cases being maliciously foisted on a candidate or that there is no substance at all in the case against him: **First**, the police have investigated the charges against the candidate

and found sufficient evidence to prosecute the accused and have filed final report u/s 173. **Second**, the Court has applied its mind to the police report u/s 173, taken cognizance on the basis after applying its mind to the final report and the materials therein and issued process to accused. **Third**, the Court has framed charges u/s 228 after hearing parties and considering all the evidence and the plea of the accused for discharge u/s 227. The standard of proof for framing charges u/s 228 is "*... there is ground for presuming that the accused has committed an offence ...*". Of course, by this, the presumption of innocence is not nullified to the extent that burden continues to be on the prosecution until the end of trial and pronouncement of verdict. But, by stage of framing of charges, at least, the judge should have satisfied himself that there is a *prima facie* case against the accused.

49. The additional protection envisaged by the Law Commission in the 244th Report is that charges should have been framed at least one year before the scrutiny of nominations. During this period, the candidate could also apply to the High Court under Section 482 of the Code or under the Article 226 for quashing of the charges against him. The contention may be that the proposed direction would amount to doing indirectly what cannot be done directly is also without merit. The proposed direction neither adds an eligibility condition in violation of Articles 84 or 173 nor imposes a disqualification in violation of the provisions of Article 102(1)(e) or 191(1)(e). It would only deter political parties from giving tickets to criminals.

50. This Hon'ble Court in catena of decisions held that right to contest is a statutory right. *Jawed v. State of Haryana (2003) 8 SCC 369*; *NP Ponnuswami v. Returning Officer 1952 SCR 218*; *Jamuna Prasad Mukhariya v. Lacchi Ram AIR 1954 SC 686*; *Jyoti Basu v. Debi Ghosal (1982) 1 SCC 691*; *Kuldip Nayyar v. UOI (2006) 7 SCC 1*; *Krishnmurthy v. UOI (2010) 7 SCC 202*; *PUCL v. UOI (2013) 10 SCC 1*; *Krishnamoorthy v. Sivakumar & others (2015) 3 SCC 467*.

51. This Hon'ble Court held that Constituent Assembly debates through light on the intention of the framers: *TMA Pai Foundation (2002) 8 SCC 481*; *S.R.Chaudhari v. State of Punjab (2001) 7 SCC 126*; *A.K. Roy v. Union of India (1982) 1 SCC 271*; *Indra Sawhney v. UOI (1992) Supp (3) SCC 217*.

52. Prayers of the instant petition is different from WP(C)536/2011. The question referred to the Constitution Bench was "... whether disqualification of membership can be laid down by the Court beyond Article 102(1)(a) to (d) and the law made by Parliament under Article 102(1)(e)"? [Petitioner's PIL WP(C) 800/2015] was tagged with WP(C) 536/2011.

53. A person against whom charges have been framed in serious offences, cannot become a Doctor, Engineer, Primary Teacher, Professor, Army Officer, Police Officer, Judicial Officer, District Magistrate, District Judge, Metropolitan Magistrate and Judge of the High Court and Supreme Court. But, he can contest election, become MLA, MP and even Minister, which is arbitrary, irrational and offends Article 14 of the Constitution. This is a matter of serious concern to both- democracy and rule of law, because many Legislators are prima

facie involved in serious criminal cases. There is absolutely no doubt that an MP receives a salary and allowances from the Government and the same having been sanctified by the *Constitution* and the law. Article 106 of the Constitution of India provides that "*the members of either House of the Parliament shall be entitled to receive salaries and allowances as may from time to time be determined by the Parliament by law.*" The Law in pursuance thereof is "*The Salary, Allowances and Pension of Members of Parliament Act, 1954* along with other Rules made such as:(i) Travelling and Daily Allowances Rules, 1957 (ii) Housing and Telephone Facilities Rules, 1956 (iii) Medical Facilities Rules, 1959 (iv) Allowances for Journeys Abroad Rules, 1960 (v) Constituency Allowance Rules, 1986 (vi) Advance for the Purchase of Conveyance Rules, 1986 (vii) Office Expense Allowance Rules, 1988. On a regular basis, each of these rules are revised upwards, at the behest of the MPs themselves, drawing on the consolidated fund of India. There are similar such provisions in each of the States for the MLAs as well. There can be no quarrel with this however, as they are considered reasonable expenditures for the upkeep and maintenance of an individual duly elected or nominated to serve the nation in the high house of Parliament.

54. Legislators are public servants who take a Constitutional Oath [Forms III and VII of Third Schedule to the Constitution] to serve the people and towards this end, they should not have to worry about their criminal cases. From the oath, it is clear that Legislators are supposed to work fulltime for public cause. It is impossible for a person to look after the nation on one hand religiously and involved in

serious criminal cases. Article 85 of the Constitution of India empowers the President of India to summon the Parliament at any time. In addition, the President follows the advice of the Council of Ministers. Therefore, effectively, the central government decides when Parliament is going to meet to oversee its functioning. The legislators have to be there in the Parliament on every working day as and all times whenever being called. In past years, there has been a decline in the number of sitting days of Parliament and percentage of attendance of MPs. Besides the above facts, the Oath of Affirmation, which a Legislator makes under Third Schedule of the Constitution, obliges him to faithfully discharge the duty upon which he is entering. Needless to say that a chargesheeted MP and MLA cannot faithfully discharge his duty as a legislator if he spends time in Courts. This would amount to a violation of the Constitutional Oath to which the Apex Court ought not to be a mute spectator.

55. The Parliament has many committees, whose members are nominated by the Chairperson. The Committees scrutinize policies, programmes and bills and propose amendments to the same. There are other Committees such as Public Accounts Committee and Committee on Public Undertakings, which scrutinize reports submitted by CAG. These Committees are regulated by the Rules of Procedure in each House. Rules of procedure in each House of the Parliament have provisions for 'Question Hour' and 'Zero Hour' during which written and oral questions can be asked by MPs. These include questions specific to State or Constituency, which he represents or of national interest. Therefore, MPs must attend the parliament every

working day and dedicate themselves fulltime for welfare of the people.

56. The Constitution also has some provisions to make MP's accountable. Article 102 states that a MP can be disqualified if he holds an "Office of Profit" under the Government. He can also be disqualified if he quits his party or defects to another party after being elected as an MP under the 10th Schedule to the Constitution. Under Article 101, if an MP is absent from the meetings for more than 60 days without permission, his seat may be declared vacant. Under Article 104, if an MP sits or votes in Parliament without taking oath, he shall be liable to pay a fine of up to Rs 500 per day. But, there is no provision either in the Constitution or Rules of Procedure to measure the performance of MPs.

57. The Legislator plays important role in development of his State. He can fulfill his developmental role under the Member of Parliament Local Area Development Scheme (MPLADS). Under the scheme, every MP is allocated Rs 5 crore per year for initiating developmental works in his constituency. The scheme is administered by the Ministry of Statistics and Programme Implementation (MoSPI), which lays down guidelines on the works and activities permitted under MPLADS. The funds under MPLADS are channeled through the respective implementing agencies in the district.

58. Local bodies such as Panchayats and municipalities also have an important role in bringing development at the grassroots. Part IXA of the Constitution has a provision under which Legislator of State may provide for representation of MP at intermediate and District

level Panchayats (Panchayat Samiti and Zila Parishad). Similarly, under Part IXA of the Constitution, State legislator may provide for representation of MPs in municipal bodies within the constituency. MPs may be nominated to District Planning Committees (DPCs) which are responsible for preparing development plans for district.

59. MPs have to monitor centrally sponsored schemes in their respective constituencies. The National Rural Drinking Water Programme (NRDWP) mandates setting up of District Water and Sanitation Mission (DWSM) of which MPs and MLAs from the area would be members. The DWSM is among other things, responsible for formulation, management monitoring of projects on drinking water security, scrutiny and approval of the schemes submitted by Block Panchayat/Gram Panchayat and coordination of matters relating to water and sanitation between different departments. Similarly, under the National Rural Health Mission (NRHM), MPs are expected to be member of District Level Vigilance and Monitoring Committees (DVMC) to review the progress in implementation of the scheme. The MPs could also work towards catalyzing schemes of the State and Central government in their constituencies. This is possible by proactive engagement with public officials at the Central and State levels, greater interaction with constituents to understand their needs and concerns, and greater information – both qualitative and quantitative – about their constituencies. As elected representatives, they have legitimate political authority to engage directly with private/corporate sector for industrial development of constituencies. The Bigger Question is: Can a DM, SDM, SP, Dy. SP

and SHO take action against the sitting MLA and MP, who has power to get him transferred.

60. MPLAD Scheme provides funds for implementing development works in their constituencies. Permissible items under the scheme are: (i) Purchase of tricycles, motorized/battery operated wheelchair, artificial limbs, etc. for physically challenged individuals. The items purchased will be given to the beneficiaries at a public function. Applications for such assistance shall be examined and approved by Committee under District Chief Medical Officer to ensure proper eligibility. (ii) Health Purchase of ambulances/hearse vans.

61. DM/CMO is responsible for ownership and management of ambulances. Purchase of ambulances to transport injured animals in Wildlife sanctuaries and National Parks. The Wildlife Sanctuary /National Park concerned would be responsible for ownership and management of the ambulances. (iii) Purchase of computers, computer software along with training for government and government aided institutions. Mobile Library for educational institutions of Centre, State, U.T/Local bodies and furniture up to Rs 50 lakh for primary/secondary school. Purchase of book for schools/colleges/public library and vehicles including school buses/vans with a limit of Rs 22 lakh/year. The Twelve Nominated MPs can recommend works anywhere in the Country.

62. The primary function of a MLA is law-making. The Constitution states that MLA can exercise his powers on the State List and Concurrent List. The State List contains subjects of importance to the individual State alone, such as trade, commerce, development,

irrigation and agriculture, while Concurrent List contains items of importance to both the Union and State Government such as succession, marriage, education, adoption, forests and so on. Although ideally only the MLAs can legislate on the State List, the Parliament can legislate on subjects in the State List while Emergency has been imposed. On the matters that are included in the Concurrent List, the laws made by the Parliament are prioritized over the laws made by the Legislative Assembly if the President does not give his assent to laws made by the Legislative Assembly. Although MLAs are the highest law-making organs of the State and the profession is honorable and noble but there is no restriction on criminals to contest election like the ban on public servant and judges.

63. A Money Bill can only originate if MLAs give consent. The States having bicameral legislator, both the Legislative Council and Vidhan Parishad can pass the Bill or suggest changes within 14 days of its receipt. MLAs authorize grants and tax-raising proposals. MLAs control the activities and actions taken by the Council of Ministers and government is answerable to the Legislative Assembly for all its decisions. Vote of no-confidence can be passed only by the MLAs and if passed by majority, force government to resign. Question Hour, Cut Motion, Adjournment Motion can be exercised by MLA in order to restrict executive. MLAs comprise Electoral College that elects the President. MLAs elect Members of the Rajya Sabha and Speaker of Assembly. In States with bicameral legislator, one-third of the members of the Legislative Council are elected by the MLAs. Profession of Legislator is noble therefore, Legislators should

comport higher standard of ethics and morality rather than lower one. Legislators take constitutional oath under schedule 3 a person with serious criminal cases should be barred from contesting, as similar to restrictions imposed upon the Doctors, Engineers, Professors, Army and Police Officers, District Magistrates, District Judges and Judges of the High Court and Supreme Court.

64. The instant petition raises an vital issue pertaining to interpretation of the Constitution particularly Articles 105(3), 194(3) in the light of solemn oath provided under Third Schedule of the Constitution in context of fixing duties and enforcing accountability of the elected legislators representing the people of India namely MPs & MLAs. Matter is relating to Constitutional Morality, Institution Integrity & Affirmative Equality and needs detailed deliberation.

65. That in order to discharge their solemn legislative and other connected duties and responsibilities effectively and faithfully, Legislators are constitutionally obliged to relegate their business, vocation, profession or other activities of income generation to back burner if that activity becomes an impediment or comes into direct conflict with discharge of constitutional duties faithfully. Law making is serious business and no amount of personal wealth creation, entertainment and/or championship and medal tally can be compared with importance of solemn act of lawmaker in the Parliament, which certainly affects every aspect relating to the idea of a nation. It is pertinent to mention that retaining such persons as members of Parliament for whom duties as Parliamentarian is subject to fulfilment of their personal business, vocation or

profession, practically amounts to conferment of mere "Title" on them which has been abolished by Article 18 of the Constitution of India.

66. Legislator is not only a Law Maker but also a superior public servant. When a person against whom charges have been framed even in normal cases, cannot become a Doctor, Engineer, DM, SP or Judge, then allowing such person to become MLA, MP and Minister, who is supposed to discharge larger public and constitutional duties faithfully, is arbitrary irrational unreasonable and violative of Article 14 of the Constitution of India.

PRAYER

Keeping in view the impending elections, growing menace of criminalization of politics and secure fundamental right of voters, guaranteed under Article 19(1) of the Constitution, this Hon'ble Court may be pleased to issue a writ, order or direction to the Election Commission of India to:

- a) insert an additional condition: *"political party shall not setup candidate with criminal antecedents"* in Paragraph 6A *"Conditions for recognition as a State Party"*, Paragraph 6B *"Conditions for recognition as a National Party"* and Paragraph 6C *"Conditions for continued recognition as a National or State Party"* of the Election Symbols (Reservation and Allotment) Order, 1968, by using the plenary power conferred under Article 324 of the Constitution;
- b) introduce a definition: *"candidate with criminal antecedents means a person against whom charges have been framed at least one year before the date of scrutiny of nominations for an offence"*

with a maximum punishment of five years or more" in paragraph 2 of the Election Symbols (Reservation and Allotment) Order, 1968 by using the plenary power conferred under Article 324 of the Constitution of India;

c) issue such other order(s) or direction(s) as this Hon'ble Court may deem fit in the facts and circumstances of the case and to ensure free and fair election;

d) and allow the cost of this writ petition to petitioner.

05.08.2019

(Ashwani Kumar

Dubey)

New Delhi

Advocate for the

Petitioner

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO OF 2019

IN THE MATTER OF:

Ashwini Kumar Upadhyay

...Petitioner

Verses

Union of India & Another

........Respondents

AFFIDAVIT

I, Ashwini Kumar Upadhyay aged 44 years, son of Sh. Suresh Upadhyay, Office at: 15, New Lawyers Chambers, Supreme Court, New Delhi-110001, Residence at: G-284, Govindpuram, Ghaziabad-201013, at present at New Delhi, do hereby solemnly affirm and declare as under:

1. I am the sole petitioner above named and well acquainted with facts and circumstances of the case and as such competent to swear this affidavit.

2. I have read and understood contents of accompanying synopsis and list of dates pages (B - H) writ petition paras (1 - 66) pages (1 - 29) and total pages (1 - 40) which are true and correct to my knowledge and belief.

3. Annexures filed with petition are true copies of their respective originals.
4. I have not filed any other petition either in this Hon'ble Court or in any other Court seeking same or similar directions as prayed except WP(C)1319/2018.
5. I have no personal interests, individual gain, private motive or oblique reasons in filing this petition. It is not guided for gain of any other individual person, institution or body. The only motive is public interest.
6. There is no civil, criminal or revenue litigation, involving petitioner, which has or could have legal nexus, with issue involved in this petition.
7. There is no requirement to move concerned government authority for relief sought in this petition. There is no other remedy available except approaching this Hon'ble Court.
8. I have gone through the Article 32 and the Supreme Court Rules and do hereby affirm that the present petition is in conformity thereof.
9. I have done whatsoever enquiry/investigation, which was in my power to do, to collect the data or material, which was available; and which was relevant for this Hon'ble Court to entertain the present petition.
10. I've not concealed any data/material/information in this petition; which may have enabled this Hon'ble Court to form an opinion, whether to entertain this petition or not and/or whether to grant any relief or not.
11. The averments made in this affidavit are true and correct to my personal knowledge and belief. No part of this Affidavit is false or fabricated, nor has anything material been concealed there from.

(Ashwini Kumar Upadhyay)

DEPONENT

VERIFICATION

I, the Deponent do hereby verify that the contents of above affidavit are true and correct to my personal knowledge and belief. No part of this affidavit is false nor has anything material been concealed there from.

I hereby solemnly affirm and declare it today i.e. the 5th day of August 2019 at New Delhi.

(Ashwini Kumar Upadhyay)

DEPONENT

APPENDIX

THE ELECTION SYMBOLS (RESERVATION AND ALLOTMENT) ORDER, 1968

An order to provide for specification, reservation, choice and allotment of symbols at elections in Parliamentary and Assembly Constituencies, for the recognition of political parties in relation thereto and for matters connected therewith.

S.O. 2959, dated the 31st August, 1968.— Whereas, the superintendence, direction and control of all elections to Parliament and to the Legislature of every State are vested by the Constitution of India in the Election Commission of India. AND WHEREAS, it is necessary and expedient to provide in the interest of purity of elections to the House of the People and the Legislative Assembly of every State and in the interest of the conduct of such elections in a fair and efficient

manner, for the specification, reservation, choice and allotment of symbols for the recognition of political parties in relation thereto and for matters connected therewith.

NOW, THEREFORE, in exercise of the powers conferred by article 324 of the Constitution [read with section 29A of the Representation of the People Act, 1951 and rules 5 and 10] of the Conduct of Elections Rules, 1961, and all other powers enabling it in this behalf, the Election Commission of India hereby makes the following Order:—

1. Short title, extent, application and commencement.—(1) This Order may be called the Election Symbols (Reservation and Allotment) Order, 1968.

(2) It extends to the whole of India and applies in relation to election in all Parliamentary and Assembly Constituencies other than Assembly Constituencies in the State of Jammu and Kashmir.

(3) It shall come into force on the date of its publication in the Gazette of India which date is hereinafter referred to as the commencement of this Order.

2. Definitions and interpretation.—(1) In this Order, unless the context otherwise requires, —

(a) "clause" means a clause of the paragraph or sub-paragraph in which the word occurs;

(b) "Commission", means the Election Commission of India constituted under article 324 of the Constitution;

(c) "constituency" means a parliamentary constituency or an assembly constituency;

(d) "contested election" means an election in a parliamentary or an assembly constituency where a poll is taken;

(e) "election" means an election to which this Order applies;

[(e) "form" means a Form appended to this Order;]

(f) "general election" means any general election held after the commencement of this Order for the purposes of constituting the House of the People or the Legislative Assembly of a State and includes a general election whereby the House of the People or the Legislative Assembly of a State in existence and functioning at such commencement, has been constituted;

(g) "paragraph" means a paragraph of this Order;

[(h) "political party" means an association or body of individual citizens of India registered with the Commission as a political party under section 29A of the Representation of the People Act, 1951 (43 of 1951);]

[(i) "State" includes the National Capital Territory of Delhi and the Union territory of Pondicherry;]

(j) "Sub-paragraph" means a sub-paragraph of the paragraph in which the word occurs;

[(jj) "Union territory" means Union territory other than the National Capital Territory of Delhi and the Union territory of Pondicherry; and]

(k) words and expressions used but not defined in this Order but defined in the Representation of the People Act, 1950 (43 of 1950), or the rules made thereunder or in the Representation of the People Act, 1951 (43 of 1951), or the rules made thereunder shall have the meanings respectively assigned to them in those Acts and rules.

(2) The General Clauses Act, 1897 (10 of 1897) shall, as far as may be, apply in relation to interpretation of this Order as it applies in relation to the interpretation of a Central Act.

4. Allotment of symbols.—In every contested election a symbol shall be allotted to a contesting candidate in accordance with the provisions of this Order and different symbols shall be allotted to different contesting candidates at an election in the same constituency. **5. Classification of symbols.**—(1) For the purpose of this Order symbols are either reserved or free.

(2) Save as otherwise provided in this Order, a reserved symbol is a symbol which is reserved for a recognised political party for exclusive allotment to contesting candidates set up by that party.

(3) A free symbol is a symbol other than a reserved symbol.

[6. Classification of political parties.—(1) For the purposes of this Order and for such other purposes as the Commission may specify as and when necessity therefor arises, political parties are either recognised political parties or unrecognised political parties.

(2) A recognised political party shall either be a National party or a State party.

[6A. Conditions for recognition as a State party.—A political party shall be eligible for recognition as a State party in a State, only if, any of the following conditions is fulfilled :—

(i) At the last general election to the Legislative Assembly of the State, the candidates set up by the party have secured not less than six per. Cent. of the total valid votes in the State; and, in addition, the party has returned at least two members to the Legislative Assembly of that State at such general election; or

(ii) At the last general election to the House of the People from that State, the candidates set up by the party have secured not less than six per. Cent. of the total valid votes polled in the State; and, in addition, the party has returned at least one member to the House of the People from that State at such general election; or

(iii) At the last general election to the Legislative Assembly of the State, the party has won at least three per. Cent. of the total number of seats in the Legislative Assembly, (any fraction exceeding half being counted as one), or at least three seats in the Assembly, whichever is more; or

(iv) At the last general election to the House of the People from the State, the party has returned at least one member to the House of the People for every 25 members or any fraction thereof allotted to that State.]

6B. Conditions for recognition as a State party.—A political party, other than a National party, shall be treated as a recognised State party in a State or States, if, and only if,— either (A)(i) the candidates set up by it, at the last general election to the House of the People, or to the Legislative Assembly of the State concerned, have secured not less than six per cent. of the total valid votes polled in that State at that general election; and (ii) in addition, it has returned at least two members to the Legislative Assembly of the State at the last general election to that Assembly;

or (B) it wins at least three per cent. of the total number of seats in the Legislative Assembly of the State (any fraction exceeding one-half being counted as one), or at least three seats in the Assembly, whichever is more, at the aforesaid general election.

6C. Conditions for continued recognition as a National or State party.—If a political party is recognised as a National party under paragraph 6A, or as a State party under paragraph 6B, the question whether it shall continue to be so recognized after any subsequent general election to the House of the People or, as the case may be, to the Legislative Assembly of the State concerned, shall be

dependent upon the fulfilment by it of the conditions specified in the said paragraphs on the results of that general election.]

ARTICLE 324 IN THE CONSTITUTION OF INDIA

"324. Superintendence, direction and control of elections to be vested in an Election Commission

(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission)

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1)

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine; Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment: Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner

(6) The President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1)

(Chetan Kumar)

(Anand Prakash)

A.R.-cum-P.S.

Court Master

To,

22.01.2019

The Chief Election Commissioner

Election Commission of India,

Nirvachan Sadan, Ashoka Road, New Delhi-110001

Sub: Restrict political parties to setup candidates with serious criminal antecedents

Sir,

(1) Criminalization of politics in India is gradually growing. What is alarming is that the percentage of candidates with criminal antecedents and their chances of winning election have actually increased steadily over the years. In fact, empirical analysis shows that, where the charges against a candidate are serious, it slightly increases the statistical probability of his winning the election. Criminals who earlier used to help politicians win elections in the hope of getting favours appear to have cut out the "middle man" in favour of entering politics themselves. Political parties in turn have become steadily more reliant on criminals as candidates not only because they "self-finance" their own elections in an era where election contests have become phenomenally expensive but also because candidates with criminal antecedents are more likely to win than "clean" candidates. Political parties are competing with each other in a race to the bottom because they cannot afford to leave their competitors free to recruit criminals.

(2) Petitioner is filing this petition, to insert an additional condition- "*political party shall not setup candidate with criminal antecedents*" in Paragraph 6A "*Conditions for recognition as a State Party*", Paragraph 6B "*Conditions for recognition as a National Party*" and Paragraph 6C "*Conditions for continued recognition as a National or State Party*" of the Election Symbols Order, 1968. The Election Commission should also introduce a definition in paragraph 2 of the Order as thus: "*candidate with criminal antecedents means a person against whom charges have been framed at least one year before the date of scrutiny of nominations for an offence with a maximum punishment of five years or more*".

(3) There would be no need even for enquiry by the Election Commission because candidates are required by Section 33A of the RPA 1951, read with Rule 4A of the Conduct of Election Rules, 1961 and Form 26, to file along with their nomination papers an affidavit containing detailed information relating to the

framing of charges against them for offences punishable with imprisonment of 2 years or more. It includes the Sections under which they are charged, the Court that did so and the date on which charges were framed. It is necessary to state that the proposed directions does not constitute a disqualification in violation of the Articles 102 or 191 because the affected candidates can always stand for election as an Independent. It would not breach the principle of separation of powers because there is a legislative vacuum insofar as the Parliament has not enacted any legislation in the field covered by the Election Symbols Order, 1968, which has been issued by the ECI in exercise of its plenary powers under Article 324 of the Constitution.

(4) The Apex Court has held that Powers of the Election Commission under Article 324 operates in areas left unoccupied by legislation and is plenary in character. [*Kanhiya Lal Omar v. R.K. Trivedi, (1985) 4 SCC 628, Para 16*] The power of “*superintendence, direction and control*” of the conduct of elections, vested in the Election Commission, is executive in character. [*A.C. Jose v. Sivan Pillai, (1984) 2 SCC 656, p. 22*] The Symbols Order is traceable to the power of the Election Commission under Article 324. [*Kanhiya Lal Omar, para 16*] The power to amend, vary or rescind an order which is administrative in character under Section 21 of the General Clauses Act, specifically referred to in paragraph 2(2) of the Symbols Order, would permit the Election Commission to withdraw recognition of a political party. [*Janata Dal v. Election Commission, (1996) 1 SCC 235*]

(5) Accordingly, it is clear that the proposed amendment in the Symbols Order would operate in a field where there is a vacuum. In fact, proposed amendment is vital because the functions performed by legislators are vital to democracy and there is no reason why they should be held to lower standards than Judges or IAS officers. Candidates for judgeship or for the IAS would not be considered at all if there were criminal cases pending against them, let alone if charges had been framed in respect of serious offences.

(6) Of course, the refusal to consider candidates for judgeship or the IAS may be on the touchstone of suitability and not eligibility but the proposed amendment is not an eligibility condition for legislators but merely imposes a condition on parties. Moreover, in the context of “institutional integrity” of office of the CVC, the Apex Court has held that the pendency of criminal cases may be considered a bar on appointment to important offices such as the CVC. [*Centre for PIL v. Union of India, (2011) 4 SCC 1*]

(7) The effect of proposed direction would only be to impose an additional condition on a political party for obtaining and retaining the status of a “*recognized national party*” or “*state party*”, which would entitle it to a reserved

symbol under the Symbols Order. The statutory right to register a political party would not be affected in any way. Moreover, under Section 13A of the Income Tax Act, political parties are exempt from paying income tax on contributions received by them. Therefore, preventing them from fielding candidates with criminal antecedents in election is a reasonable restriction, keeping in mind the concessions and privileges enjoyed by them.

(8) From the standpoint of the candidate against whom charges have been framed for a serious offence, the settled legal position is that he has only a statutory right to contest elections. *[Krishnamoorthy, paras 59-60]* Further, even assuming that he is innocent, it would have indirect impact of possibly preventing him *for limited period of time until his trial is over* from obtaining a ticket from a recognized political party but such a measure would be in the larger public interest of ensuring that our polity remains free of criminal. The proposed amendment cannot result in violation of Article 19(1)(c) to form association. A candidate with criminal antecedents can become/continue to be a member of the party.

(9) The condition that political party not give him a ticket as a condition for recognition as a State/National party to guarantee continued usage of reserved symbol does not impinge on freedom of association of candidate/party. Further, even assuming that it could be characterized as falling within the scope of Article 19(1)(c), proposed amendment is a reasonable restriction that is narrowly tailored and can be justified on the ground of public order and morality in Article 19(4) of the Constitution.

Sir,

Keeping in view the impending elections, the growing menace of criminalization of politics and to secure fundamental right of voters, guaranteed under Articles 14 and 19(1) of the Constitution of India, please take appropriate steps to:

(a) insert an additional condition: *"political party shall not setup candidate with criminal antecedents"* in Paragraph 6A *"Conditions for recognition as a State Party"*, Paragraph 6B *"Conditions for recognition as a National Party"* and Paragraph 6C *"Conditions for continued recognition as a National or State Party"* of the Election Symbols (Reservation & Allotment) Order, 1968, by using the plenary power under Article 324 of the Constitution;

(b) introduce a definition: *"candidate with criminal antecedents means a person against whom charges have been framed at least one year before the date of scrutiny of nominations for an offence with a maximum punishment of*

five years or more" in paragraph 2 of the Election Symbols (Reservation and Allotment) Order, 1968 by using the plenary power under Article 324 of the Constitution of India;

(c) issue such other order(s) or direction(s) as the Election Commission of India deems fit to ensure free and fair election and decriminalize the electoral system.

Thanks and Warm Regards.

Ashwini Kumar Upadhyay

15, M.C.Setalvad Chambers

Supreme Court, New Delhi-110001

G-284, Govindpuram, Ghaziabad-201013

Phone: 8800278866, aku.adv@gmail.com

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO 1011 OF 2019

(PIL UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

ASHWINI KUMAR UPADHYAY

...PETITIONER

VERSES

UNION OF INDIA & ANOTHER

...RESPONDENTS

PAPER BOOK

[FOR INDEX KINDLY SEE INSIDE]

(ADVOCATE FOR PETITIONER: ASHWANI KUMAR DUBEY)

INDEX OF RECORD OF PROCEEDINGS		
Sr. No.	Date of Record of Proceedings	Page
1		
2		
3		
4		
5		

6		
7		
8		
9		
10		
11		
12		
13		
14		
15		

INDEX

S.No	Particulars of the documents	Page number of part to which it belongs		Remarks
		Part-I (Contents of Paper Book)	Part-II (Contents of file alone)	
(i)	(ii)	(iii)	(iv)	(v)
1	Listing Performa	A-A1	A-A1	
2	Cover Page-Paper Book		A-2	
3	Record of Proceedings		A-3	
4	Defect List		A-4	

5	Note Sheet		NS1	
6	Synopsis & List of Date	B-H		
7	Petition & Affidavit	1-30		
8	Appendix : The Election Symbol Order 1968 & Article 324 of the Constitution of India	31-33		
9	Annexure P-1: Supreme Court Order in WP(C) 1319/2018, 21.01.2019	34		
10	Annexure P-2: Representation to Chief Election Commissioner dated 22.01.2019	35-37		
11	F/M		38	
12	V/A		39	
13	I.D. Proof		40	

PERFORMA FOR FIRST LISTING

Section: PIL

The case pertains to (Please tick / check the correct box):

- Central Act: Constitution of India
- Section: Article 324 of the Constitution
- Central Rule: N/A
- Rule No: N/A
- State Act: N/A
- Section: N/A

- State Rule: N/A
 - Rule No: N/A
 - Impugned Interim Order: N/A
 - Impugned Final Order / Decree: N/A
 - High Court: N/A
 - Name of Judges: N/A
 - Tribunal / Authority Name : N/A
-

1. Nature of Matter: Civil
 2. (a) Petitioner / Appellant : Ashwini Kumar Upadhyay
(b) Email ID: aku.adv@gmail.com,
(c) Phone No: 08800278866,
 3. (a) Respondent: Union of India and another
(b) Email ID: N/A
(c) Phone No: N/A
 4. (a) Main Category: 08 PIL Matters
(b) Sub Category: 0810, PIL relating to Election Commission
 5. Not to be listed before: N/A
 - 6(a). Similar disposed of matter: WP(C) 1319/2018
6(b). Similar pending matter: No similar matter pending
 7. Criminal Matters: N/A
- (a) Whether accused / convicted has surrendered: N/A
 - (b) FIR / Complaint No: N/A
 - (c) Police Station: N/A
 - (d) Sentence Awarded: N/A

(e) Period of Sentence Undergone including period of detention/custody under gone: N/A

8. Land Acquisition Matters:

(a) Date of Section 4 Notification: N/A

(b) Date of Section 6 Notification: N/A

(c) Date of Section 17 Notification

9. Tax Matters: State the Tax Effect: N/A

10. Special Category: N/A

11. Vehicle No in case of motor accident claim matters): N/A

Date: 05.08.2019

ADVOCATE FOR PETITIONER

(ASHWANI KUMAR DUBEY)

Advocate-on-Record

Registration Code No-1797

ashwanik.advocate@gmail.com

9818685007, 011-22787061, 45118563

SYNOPSIS

Criminalization of politics in India has only grown. National Election Watch and Association for Democratic Reforms (ADR) has analyzed the self-sworn affidavits of 539 out of 542 MPs of the present Lok Sabha. Elections in Vellore constituency had been cancelled and 3 MPs were not analyzed due to unavailability of their clear and complete affidavits on the ECI website at the time of making the

report. Out of 539 MPs, 233 (43%) MPs have declared criminal cases against themselves. Out of 542 winners analyzed after 2014 General Election, 185 (34%) had declared criminal cases against themselves and out of 543 winners analyzed after 2009 Lok Sabha election, 162(30%) had declared criminal cases against themselves. There is an increase of 44% in the number of MPs with declared criminal cases since 2009.

Presently 159(29%) MPs have declared serious criminal cases including cases related to rape, murder, attempt to murder, kidnapping, crimes against women etc. Out of 542 winners analyzed after 2014 Lok Sabha elections, 112 (21%) had declared serious criminal cases against themselves. Out of 543 winners analyzed after 2009 Lok Sabha election, 76 (14%) had declared serious criminal cases against themselves. So, there is an increase of 109 % in the number of winners with declared serious criminal cases since 2009.

Mr. Kuriakose from Idukki Constituency has declared 204 criminal cases including cases related to culpable homicide, house trespass, robbery, criminal intimidation etc. Total 30 MPs have declared cases of attempt to murder (Section 307), 19 MPs have declared cases related to crimes against women and out of these 19 MPs, 3 MPs have declared cases related to rape (IPC Section-376). Total 29 MPs have declared cases related to Hate Speech.

ADR Report indicates that the chances of winning for a candidate with declared criminal cases in the Lok Sabha 2019 is 15.5 % whereas for a candidate with clean background, it is 4.7 %. Total 116 (39%) out of 301 winners from BJP, 29 (57%) out of 51 winners from

INC, 10 (43%) out of 23 winners from DMK, 9 (41%) out of 22 winners fielded by AITC and 13 (81%) out of 16 winners from JD(U) have declared criminal cases against themselves in their affidavits. Total 87 (29%) out of 301 winners from BJP, 19 (37%) out of 51 winners from INC, 6 (26%) out of 23 winners from DMK, 4 (18%) out of 22 winners fielded by AITC and 8 (50%) out of 16 winners from JD(U) have declared serious criminal cases against themselves in their affidavits.

Out of the 539 MPs analyzed, 475 (88%) are crorepatis. Out of 542 winners analyzed during Lok Sabha 2014 election, 443 (82%) winners were crorepatis. Out of 543 winners analyzed during Lok Sabha 2009 election, 315 (58%) winners were crorepatis. Total 265 (88%) out of 301 MPs of BJP, 43 (84%) out of 51 MPs of INC, 22 (96%) out of 23 MPs of DMK, 20 (91%) out of 22 MPs of AITC, 19 (86%) out of 22 MPs of YSRCP and 18 (100%) MPs of SS have declared assets worth more than Rs. 1 crore. The chance of winning for a crorepati candidate in the Lok Sabha 2019 is 21%, whereas chance of winning for a candidate with assets less than Rs. 1 crore is 1%. A total of 4 out of the 539 winners analyzed have not declared their PAN details. The average assets of 225 re-elected MPs fielded by various parties including independents in 2014 was Rs 17.07 Crores. The average asset of these 225 re-elected MPs in 2019 is Rs 21.94 Crores. The average asset growth for these 225 re-elected MPs, between the Lok Sabha elections of 2014 and 2019 is Rs 4.87 Crores. Average percentage growth in assets for the 225 re-elected MPs is 29%.

Presently, 128 (24%) MPs have declared their educational qualification to be between 5th pass and 12th pass, while 392 (73%) MPs have declared having an educational qualification of graduate and above. One MP has declared himself to be just literate and One MP is illiterate. 194 (36%) MPs have declared their age to be between 25 and 50 years while 343 (64%) MPs have declared their age to be between 51 and 80 years. Two MPs have declared they are more than 80 years old. Presently, there are 77 (14%) women MPs. Out of 542 winners analyzed in the Lok Sabha elections 2014, 62 (11%) winners were women. Out of 543 winners analyzed in the Lok Sabha elections 2009, 59 (11%) winners were women.

What is alarming is that the percentage of candidates with criminal antecedents and their chances of winning have actually increased steadily over the years. In fact, empirical analysis shows that, where the charges against a candidate are serious, it slightly increases the statistical probability of his winning the election. Criminals who earlier used to help politicians win elections in the hope of getting favours appear to have cut out the "middle man" in favour of entering politics themselves. Political parties in turn have become steadily more reliant on criminals as candidates not only because they "self-finance" their own elections in an era where election contests have become phenomenally expensive but also because candidates with criminal antecedents are more likely to win than "clean" candidates. Political parties are competing with each other in a race to the bottom because they cannot afford to leave their competitors free to recruit criminals. Despite the above data, neither Government of India

nor ECI have taken apposite steps to tackle the menace of criminalization. Hence this Hon'ble Court is the only hope now.

Petitioner is filing this petition, seeking a writ/order/direction to the Election Commission to insert an additional condition- "*political party shall not setup candidate with criminal antecedents*" in Paragraph 6A "*Conditions for recognition as a State Party*", Paragraph 6B "*Conditions for recognition as a National Party*" and Paragraph 6C "*Conditions for continued recognition as a National or State Party*" of the Election Symbols Order, 1968. The ECI should also introduce a definition in paragraph 2 of the Order as thus: "*candidate with criminal antecedents means a person against whom charges have been framed at least one year before the date of scrutiny of nominations for an offence with a maximum punishment of five years or more*".

There would be no need even for enquiry by the Election Commission because candidates are required by Section 33A of the RPA,1951, read with Rule 4A of the Conduct of Election Rules, 1961 and Form 26, to file along with their nomination papers an affidavit containing detailed information relating to the framing of charges against them for offences punishable with imprisonment of 2 years or more. It includes the Sections under which they are charged, the Court that did so and the date on which charges were framed. It is necessary to state that the proposed directions does not constitute a disqualification in violation of the Articles 102 or 191 because the affected candidates can always stand for election as an Independent.

Any such direction by this Hon'ble Court to the ECI also would not breach the principle of separation of powers because there is a legislative vacuum insofar as the Parliament has not enacted any legislation in the field covered by the Election Symbols Order, 1968, which has been issued by the ECI in exercise of its plenary powers under Article 324 of the Constitution.

Powers of the ECI under Article 324 operates in areas left unoccupied by legislation and is plenary in character. [*Kanhiya Lal Omar v. R.K. Trivedi, (1985) 4 SCC 628, Para 16*] The power of "superintendence, direction and control" of the conduct of elections, vested in the Election Commission, is executive in character. [*A.C. Jose v. Sivan Pillai, (1984) 2 SCC 656, p. 22*] The Symbols Order is traceable to the power of the Election Commission under Article 324. [*Kanhiya Lal Omar, para 16*] The power to amend, vary or rescind an order which is administrative in character under Section 21 of the General Clauses Act, specifically referred to in paragraph 2(2) of the Symbols Order, would permit the Election Commission to withdraw recognition of a political party. [*Janata Dal v. Election Commission, (1996) 1 SCC 235, para 6*]

Accordingly, it is clear that the proposed direction to the ECI to amend the Symbols Order would operate in a field where there is a vacuum. In fact, proposed direction is vital because the functions performed by legislators are vital to democracy and there is no reason why they should be held to lower standards than Judges or IAS officers. Candidates for judgeship or for the IAS would not be

considered at all if there were criminal cases pending against them, let alone if charges had been framed in respect of serious offences.

Of course, the refusal to consider candidates for judgeship or the IAS may be on the touchstone of suitability and not eligibility but the proposed direction is not an eligibility condition for legislators but merely imposes a condition on parties. Moreover, in the context of “institutional integrity” of office of the CVC, this Hon’ble Court has held that the pendency of criminal cases may be considered a bar on appointment to important offices such as the CVC. [*Centre for PIL v. Union of India, (2011) 4 SCC 1*]

The effect of proposed direction would only be to impose an additional condition on a political party for obtaining and retaining the status of a “*recognized national party*” or “*state party*”, which would entitle it to a reserved symbol under the Symbols Order. The statutory right to register a political party would not be affected in any way. Moreover, under Section 13A of the Income Tax Act, political parties are exempt from paying income tax on contributions received by them. Therefore, preventing them from fielding candidates with criminal antecedents in election is a reasonable restriction, keeping in mind the concessions and privileges enjoyed by them.

From the standpoint of the candidate against whom charges have been framed for a serious offence, the settled legal position is that he has only a statutory right to contest elections. [*Krishnamoorthy, paras 59-60*] Further, even assuming that he is innocent, it would have indirect impact of possibly preventing him *for limited period of time until his trial is over* from obtaining a ticket from a recognized

political party but such a measure would be in the larger public interest of ensuring that our polity remains free of criminal.

The proposed direction cannot result in a violation of Article 19(1)(c) to form association. A candidate with criminal antecedents can become/continue to be a member of the party. The condition that political party not give him a ticket as a condition for recognition as a State/National party to guarantee continued usage of reserved symbol does not impinge on freedom of association of candidate/party. Further, even assuming that it could be characterized as falling within the scope of Article 19(1)(c), proposed direction is a reasonable restriction that is narrowly tailored and can be justified on the ground of public order and morality in Article 19(4) of the Constitution.

LIST OF DATES

20.05.1990: The Goswami Committee suggested various measures to ensure free and fair election but Executive did nothing.

29.05.1999: Law Commission (170 Report) suggested certain measures to regulate functioning of parties, Executive did nothing.

31.03.2002: NCRWC submitted its proposals to regulate functioning of parties but Executive did nothing.

05.07.2004: ECI submitted detailed proposals to regulate functioning of political parties but no steps have been taken yet.

08.12.2010: "Background Paper on Electoral Reforms", prepared by the Law Ministry endorsed proposals of the ECI and LCI.

24.02.2014: Law Commission submitted its 244th report on decriminalization of politics, but Executive did nothing.

12.03.2015: Law Commission submitted its 255th report on electoral reform, but Executive did nothing to implement it.

05.12.2016: Electoral Commission submitted its detailed proposals to ensure free and fair election but Executive did nothing.

26.10.2018: Petitioner filed WP(C) 1319/2018 for the same relief.

21.01.2019: The Apex Court disposed of the petition. (Annex. P-1)

22.01.2019: Petitioner submitted Representation to ECI (Annex. P-2)

05.08.2019: Despite the Reports referred above and the efforts of this Hon'ble Court, neither Government of India enacting a Law nor ECI has taken appropriate steps to tackle the menace of criminalization. Hence, this writ petition in larger public interest and in the interest of justice.